Thero Building Systems *and* Massachusetts Laborers' Benefit Funds. Case 1–CA–28299

August 25, 1992

DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS DEVANEY AND OVIATT

Upon a charge filed by the Massachusetts Laborers' Benefit Funds on May 20, 1991, the General Counsel of the National Labor Relations Board issued a complaint on July 9, 1991, against Thero Building Systems, the Respondent, alleging that it has violated Section 8(a)(1) and (5) of the National Labor Relations Act.

The complaint alleges that the Respondent has failed and refused to make payments to various fringe benefit funds as provided for in the 1988–1991 collective-bargaining agreement between the Massachusetts Laborers' District Council, Laborers' International Union of North America, AFL–CIO (the Union) and the Respondent. On November 12, 1991, the Respondent filed its answer admitting in part and denying in part the allegations in the complaint and requesting that the complaint be dismissed.

On April 9, 1992, the General Counsel filed a Motion to Transfer Proceeding to the Board, to Amend Formal Papers, and for Summary Judgment. On April 15, 1992, the Board issued an order transferring the proceeding to the Board and a Notice to Show Cause why the motion should not be granted. The Respondent filed a response, contending that the General Counsel has failed to introduce evidence outside of the pleadings to substantiate certain factual allegations of the complaint, including the Respondent's duty to pay, its failure to pay, and the specific amounts that the Respondent was required to pay, and noting that the Respondent had denied certain complaint allegations.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

Ruling on Motion for Summary Judgment

The Respondent admits in its answer that about March 26, 1990, it entered into an "Acceptance of Agreement and Declaration of Trust," which bound the Respondent to the terms and conditions of employment of the collective-bargaining agreement then in effect between the Union and Associated General Contractors of Massachusetts, Inc. (the Association), and all successor agreements including the agreement effective for the period June 1, 1988, through May 31, 1991. In its answer, the Respondent denies the allegations in paragraph 11 of the complaint that since about November 20, 1990, it has failed and refused to make contractually required contributions to several union funds as set out in the Acceptance of Agreement and the 1988–1991 agreement. In its answer, the Respondent states it denies the allegations for the following specified reasons: it is in litigation with the primary general contractor for the jobs from which its obligations have arisen; the litigation involves approximately $75,000 claimed by the Respondent as due for work performed; the general contractor has, as a result of the lawsuit, frozen moneys due to the Respondent from other projects; and as a result the Respondent does not have the money to pay the Union. In its answer, the Respondent further admits that the subjects contained in paragraph 11 are mandatory subjects of bargaining and that it engaged in the conduct described in paragraph 11 without prior notice to the Union and without having afforded the Union an opportunity to bargain.

The Respondent's contention that it does not have the money to pay the Union does not constitute an adequate defense to the allegations that it failed and refused to make the contractually required contributions.[1] Thus, it is well settled that an employer violates Section 8(a)(5) and (1) when it modifies the terms and conditions of employment contained in a collective-bargaining agreement to which it is a party without obtaining the consent of the union. *Rapid Fur Dressing*, 278 NLRB 905, 906 (1986). Financial necessity, even if proven, does not constitute an adequate defense to an allegation that an employer has unlawfully failed to abide by the provisions of a collective-bargaining agreement embodying mandatory subjects of bargaining. *Tammy Sportswear Corp.*, 302 NLRB No. 149, slip op. at 2 (May 9, 1991); *Air Convey Industries*, 292 NLRB 25 (1988); *Raymond Prats Sheet Metal Co.*, 285 NLRB 194, 196 (1987).[2]

Accordingly, the Respondent has admitted all the facts material to a resolution of the unfair labor practice issues raised by the complaint allegations and has not raised an adequate defense to those allegations. Because there are no material facts in dispute, and in the absence of any good cause to the contrary having been shown by the Respondent, we grant the General Counsel's Motion for Summary Judgment.

[1] It is clear from the Respondent's answer that it has, in effect, admitted the factual allegations of par. 11 of the complaint including the allegations that it has failed to make the contractually required contributions.

[2] In Member Oviatt's view, there are limited circumstances, not present here, when inability to pay may constitute a defense. See his statement in Tammy, supra, slip op. at 3 fn. 1.

On the entire record, the Board makes the following

FINDINGS OF FACT

I. JURISDICTION

The Respondent, a corporation with an office and place of business in Manchester, New Hampshire (the Respondent's Manchester facility), has been engaged at various jobsites as a contractor in the construction industry. During the calendar year ending December 31, 1990, the Respondent, in the course and conduct of its business operations, provided services valued in excess of $50,000 for enterprises at jobsites located outside the State of New Hampshire. In addition, during the calendar year ending December 31, 1990, the Respondent, in the course and conduct of its business operations, purchased and received at its Manchester facility products, goods, and materials valued in excess of $50,000 directly from points outside the State of New Hampshire. The Respondent admits, and we find, that the Respondent is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

At all times material to this proceeding, the Association has been an organization composed of various employers engaged in the construction industry, and which exists for the purpose, inter alia, of representing its employer-members in negotiating and administering collective-bargaining agreements with various labor organizations, including the Union. About June 1, 1988, the Association and the Union entered into a collective-bargaining agreement, which by its terms is effective for the period June 1, 1988, through May 31, 1991. About March 26, 1990, the Respondent entered into an "Acceptance of Agreement and Declaration of Trust," which bound the Respondent to the terms and conditions of employment in the collective-bargaining agreement then in effect and all successor agreements, including the 1988–1991 agreement.

The following employees of the Respondent constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9(b) of the Act:

> All laborers employed by members of the Association and the employers who have authorized said Association to bargain on their behalf, including Respondent, but excluding guards and supervisors as defined in the Act.

By virtue of the 1988–1991 agreement, at all material times, the Union, by virtue of Section 9(a) of the Act, has been, and is, the exclusive representative of the employees in the unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

Since about November 20, 1990, the Respondent has failed and refused to make the following contractually required contributions, as set out in the Acceptance of Agreement and the 1988–1991 agreement: Massachusetts Statewide Laborers' Pension Fund; New England Laborers' Training Fund; Massachusetts Laborers' Statewide Health & Welfare Fund; Massachusetts Statewide Legal Services Fund; Massachusetts Laborers' Statewide Annuity Fund; and Dues Deduction Fund.

These subjects relate to wages, hours, and other terms and conditions of employment of the unit and are mandatory subjects of bargaining. The Respondent engaged in the above acts and conduct without prior notice to the Union and without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of the Respondent's employees with respect to such acts and conduct and their effects.

We find that, by the above conduct, the Respondent has failed and refused to bargain collectively with the representative of its employees, and thereby has violated Section 8(a)(1) and (5) of the Act.

CONCLUSION OF LAW

By failing and refusing to make contractually required fund contributions, as set out in the Acceptance of Agreement and the 1988–1991 agreement, without having afforded the Union an opportunity to negotiate and bargain as the exclusive representative of the Respondent's employees, the Respondent has engaged in unfair labor practices affecting commerce within the meaning of Section 8(a)(1) and (5) and Section 2(6) and (7) of the Act.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, we shall order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act. We shall order the Respondent to make all contractually required contributions to the funds named in the complaint.[3] We also shall order the

[3] Because the provisions of employee benefit fund agreements are variable and complex, we leave to the compliance stage the question whether the Respondent must pay any additional amounts into the benefit funds in order to satisfy our "make-whole" remedy. *Merryweather Optical Co.*, 240 NLRB 1213 (1979).

Respondent to reimburse employees for any expenses they may have incurred because of any failure on the part of the Respondent to make those payments, in the manner prescribed in *Kraft Plumbing & Heating*, 252 NLRB 891 fn. 2 (1980), enfd. mem. 661 F.2d 940 (9th Cir. 1981), with interest as provided in *New Horizons for the Retarded*, 283 NLRB 1173 (1987). Amounts to be paid into benefit funds, if any, shall be computed in the manner set forth in *Merryweather Optical Co.*, supra.

ORDER

The National Labor Relations Board orders that the Respondent, Thero Building Systems, Manchester, New Hampshire, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Failing and refusing to bargain with Massachusetts Laborers' District Council, Laborers' International Union of North America, AFL–CIO by failing and refusing to make contractually required contributions to the Massachusetts Statewide Laborers' Pension Fund, the New England Laborers' Training Fund, Massachusetts Laborers' Statewide Health & Welfare Fund, the Massachusetts Statewide Legal Services Fund, the Massachusetts Laborers' Statewide Annuity Fund, and the Dues Deduction Fund, without giving the Union notice and an opportunity to bargain. The following employees of the Respondent constitute an appropriate unit:

> All laborers employed by members of the Association and the employers who have authorized said Association to bargain on their behalf, including Respondent, excluding guards and supervisors as defined in the Act.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Make all contractually required fund contributions in the manner set forth in the remedy section of this decision.

(b) Make whole all unit employees for any losses they may have suffered as a result of any failure by the Respondent to make contractually required fund contributions, in the manner set forth in the remedy section of this decision.

(c) Preserve and, on request, make available to the Board or its agents for examination and copying, all payroll records(social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of fund contributions due under the terms of this Order.

(d) Post at its facility in Manchester, New Hampshire, copies of the attached notice marked "Appendix."[4] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material.

(e) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[4] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT fail and refuse to bargain with the Massachusetts Laborers' District Council, Laborers' International Union of North America, AFL–CIO by failing and refusing to make contractually required contributions to the Massachusetts Statewide Laborers' Pension Fund, the New England Laborers' Training Fund, the Massachusetts Laborers' Statewide Health & Welfare Fund, the Massachusetts Statewide Legal Services Fund, the Massachusetts Laborers' Statewide Annuity Fund, and the Dues Deduction Fund, without giving the Union notice and an opportunity to bargain. The following employees of the Respondent constitute an appropriate unit:

> All laborers employed by members of the Association and the employers who have authorized said Association to bargain on their behalf, including us, but excluding guards and supervisors as defined in the Act.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exer-

cise of the rights guaranteed you by Section 7 of the Act.

WE WILL make all contractually required fund contributions.

WE WILL make whole all unit employees for any losses they may have suffered as a result of our failure to make contractually required fund contributions, with interest.

THERO BUILDING SYSTEMS